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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:

2003 JUN 23 P 4: 15

MARC SPITZER, Chairman
JIM IRVIN
WILLIAM A. MUNDELL
JEFF MATCH-MILLER
MIKE GLEASON

AZ CORP COMMISSION
DOCUMENT CONTROL

In the matter of:

DOCKET NO. S-03539A-03-0000

YUCATAN RESORTS, INC., d/b/a
YUCATAN RESORTS, S.A.,
3222 Mishawaka Avenue
South Bend, IN 46615;
P. O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

RESPONDENT LORY KELLY'S (1)
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION AND
INSUFFICIENCY OF SERVICE OF
PROCESS AND (2) JOINDER IN THE
MOTION TO DISMISS FILED BY
RESPONDENTS RESORT HOLDINGS
INTERNATIONAL, INC. AND
YUCATAN RESORTS, INC.

RESORT HOLDINGS INTERNATIONAL,
INC. d/b/a
RESORT HOLDINGS INTERNATIONAL,
S.A.,
3222 Mishawaka Avenue
South Bend, IN 46615;
P. O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

WORLD PHANTASY TOURS, INC.
a/k/a MAJESTY TRAVEL
a/k/a VIAJES MAJESTY
Calle Eusebio A. Morales
Edificio Atlantida, P Baja
APDO, 8301 Zona 7 Panama

MICHAEL E. KELLY and LORI KELLY,
husband and wife,
3222 Mishawaka Avenue
South Bend, IN 46615;
P. O. Box 2661
South Bend, IN 46680;

Respondents.

Arizona Corporation Commission

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CAR

Respondent Lory Kelly, incorrectly enumerated as Lori Kelly (hereinafter "Mrs. Kelly"), pursuant to Arizona Rule of Civil Procedure 12(b)(2) and (5), hereby moves the Arizona Corporation Commission (the "Commission") for an Order dismissing the Temporary Order to Cease and Desist and the Notice of Opportunity for Hearing ("C&D"), as against Mrs. Kelly, because (1) the Commission cannot exercise personal jurisdiction over her and (2) the Commission's Securities Division (the "Division") failed to serve the C&D on Mrs. Kelly. This Motion is supported by (a) the accompanying Memorandum of Points and Authorities, (b) the attached Declaration of Lory Kelly ("Kelly Declaration"), (c) "Respondent Michael E. Kelly's (1) Motion to Dismiss for Lack of Personal Jurisdiction and Insufficiency of Service of Process and (2) Joinder in the Motion to Dismiss Filed by Respondents Resort Holdings, Inc. and Yucatan Resort, Inc.," and all attachments thereto ("Michael Kelly Motion to Dismiss"), which is being filed concurrently herewith, and (d) the record in this action, all of which are incorporated herein by this reference.

Without waiving any defense for lack of personal jurisdiction or insufficiency of service of process, Mrs. Kelly also moves that in the event the Commission denies this Motion to dismiss for lack of personal jurisdiction and insufficiency of service of process, the Commission dismiss this action under Ariz. R. Civ. P. 12(b)(6), for the reasons set forth in "Respondents Resort Holdings International, Inc. ("RHI") and Yucatan Resorts, Inc.'s Motion to Dismiss Temporary Order to Cease and Desist and Brief in Support Thereof." Mrs. Kelly hereby joins in that motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

The Division has named Mrs. Kelly, among others, as a Respondent to the C&D. However, Mrs. Kelly is not an Arizona resident, and neither she nor her husband, Respondent

Michael E. Kelly ("Kelly"), has the minimum contacts necessary to permit the Commission to exercise personal jurisdiction over them. Also, the Division failed to serve Mrs. Kelly with the C&D in a manner prescribed and authorized under the Rules for Administrative Proceedings. Accordingly, Mrs. Kelly must be dismissed from this proceeding on both grounds.

II. BACKGROUND.

This matter arises out of the sale of Universal Leases for vacation resorts in Mexico and Panama. The Division alleges that these Universal Leases are "investment contracts," and subject to the registration requirements and anti-fraud provisions of the Arizona Securities Act (the "Act"). The Division issued the C&D based on alleged violations of the Act (A.R.S. §§ 44-1841, -1842 and -1991).

Mrs. Kelly is named as a Respondent, together with Mr. Kelly and the following entities, among others: Resort Holdings International, Inc. ("RHI, Inc."), Resort Holdings International, S.A., Yucatan Resorts, Inc., and Yucatan Resorts, S.A. (hereinafter, collectively, the "Respondent Entities"). Mr. Kelly is the developer of various timeshare resort properties throughout Mexico and Central America. [Declaration Of Michael E. Kelly, ¶5.]

The Division has not alleged that Mrs. Kelly offered or sold timeshare units in Arizona. It has not alleged that Mrs. Kelly is or was an officer, director, employee or shareholder of any of the Respondent Entities, or that she is affiliated with any of the Respondent Entities in any manner whatsoever.¹ Nor has the Division alleged that Mrs. Kelly has any knowledge or information concerning any alleged transaction that is the subject of the C&D. Rather, the Division has joined Mrs. Kelly "under A.R.S. § 44-2301(C) solely for the purposes of determining the liability of the

¹ Mrs. Kelly's Declaration establishes that she is "not, and never [has] been, an officer, director, shareholder or employee of any of the following businesses or entities: Yucatan Resorts, Inc.; Yucatan Resorts, S.A.; Resort Holdings International, Inc.; Resort Holdings International, S.A.; or World Phantasy Tours, Inc., aka Majesty Travel, aka Viajes Majesty." [Kelly Declaration, ¶9].

1 marital community.” [C&D, ¶6] However, the Kellys are full-time residents of Mexico and there
2 is no “marital community” subject to Arizona law. Furthermore, neither Mr. nor Mrs. Kelly has
3 sufficient minimum contacts with the State of Arizona to establish personal jurisdiction.² [See
4 *generally* Michael Kelly’s Motion to Dismiss.] Moreover, A.R.S. § 44-2310(C) is unconstitutional
5 because it impermissibly expands the Commission’s authority beyond what is contemplated by,
6 and granted in, the Arizona Constitution.

7 With regard to service of the C&D, the Arizona Administrative Code (“A.A.C.”) provides
8 specific rules for service of process in foreign countries. See A.A.C. R14-4-303(F). But, the
9 Division ignored those rules and, instead, attempted to effectuate service on Mrs. Kelly in Indiana.
10 The Division’s attempt at service fails.

11
12 **III. MRS. KELLY SHOULD BE DISMISSED FROM THIS ACTION BECAUSE THE**
13 **COMMISSION LACKS PERSONAL JURISDICTION OVER HER.**

14 **A. The Commission Cannot Establish That Mrs. Kelly Has Sufficient Minimum**
15 **Contacts With The Sate of Arizona To Establish Personal Jurisdiction Over**
16 **Her.**

17 To compel a non-resident to appear in an Arizona tribunal, the tribunal must establish
18 personal jurisdiction over the non-resident. *See* Ariz. R. Civ. P. 4.2(a); *Houghton v. Piper Aircraft*
19 *Corp.*, 112 Ariz 375, 367, 542 P.2d 24, 26 (1975). Arizona’s Long-Arm statute is intended to allow
20 Arizona to exert this personal jurisdiction, but only “to the maximum extent permitted by the
21 Constitution of this State and the Constitution of the United States.” Ariz. R. Civ. P. 4.2(a).
22 Foremost, the tribunal must determine that jurisdiction is consistent with the Due Process Clause
23 of the Fourteenth Amendment to the United States Constitution. *See* *Batton v. Tennessee Farmers*
24 *Mutual Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4 (1987).

25
26 ² A.R.S. § 44-2310(C) presumes that the Kellys have a “marital community” and that Arizona law would apply to this
27 “community.” However, the Kellys are residents of Mexico, and subject to Mexican law, and specifically reserve the
right to contest jurisdiction on this issue.

As set forth below, Mrs. Kelly does not have the requisite "minimum contacts" required under the Due Process Clause of the United States Constitution to convey personal jurisdiction over her. The same is true for Mr. Kelly who has also filed a Motion to Dismiss for Lack of Personal Jurisdiction, hereby incorporated by this reference. And, because neither of them have sufficient "minimum contacts," the joinder apparently authorized under A.R.S. § 44-2301(C) is unavailing as a pretext for haling Mrs. Kelly before the Commission.

1. The Commission cannot establish general or specific jurisdiction over Mrs. Kelly, individually.

A state may assert either "general" or "specific" jurisdiction over a nonresident respondent, depending on the nature and the extent of contacts between that respondent and the forum. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984); *Armstrong v. Aramco Serv. Co.*, 155 Ariz. 345, 348, 746 P.2d 917, 920 (Ct. App. 1987). Under either standard, "the constitutional touchstone remains whether the [respondent] purposefully established 'minimum contacts' in the forum State," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), although the extent of the contacts required differs significantly under each of the two standards.

In considering minimum contacts, "it is essential in each case that there be some act by which the [respondent] purposefully avails [herself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). This "purposeful availment" requires that the nonresident respondent's conduct reflect such a deliberate connection with the forum state that she should "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Hoskinson Through Fleming v. State of Cal.*, 168 Ariz. 250, 252, 812 P.2d 1068, 1070 (Ct. App. 1990).

1 "Specific jurisdiction" requires that (1) the respondent "purposefully avail" herself of the
2 privilege of conducting business in the forum; (2) the claim arise out of or relate to the
3 respondent's contacts with Arizona; and (3) the exercise of personal jurisdiction over the
4 nonresident respondent be reasonable under the circumstances. *See Williams v. Lakeview Co.*, 199
5 Ariz. 1, 3, 13 P.3d 280, 282 (2000) (citing *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th
6 Cir. 1990)). Again, the "touchstone" for this entire inquiry is the sufficiency of Mrs. Kelly's
7 "minimum contacts" with Arizona.

8 Mrs. Kelly is a full-time resident of Mexico, and has never lived in Arizona. [Kelly Dec.,
9 ¶¶ 3, 10.] She has never owned or leased property in Arizona, has never had a bank account,
10 checking account or brokerage account in Arizona, has never held any Arizona professional
11 licenses or an Arizona driver's license, has never filed an Arizona State income tax return, and is
12 not registered to vote in Arizona. [*Id.*, ¶¶ 11-13.] Mrs. Kelly has never had an office or telephone
13 listing in Arizona, has never kept files in Arizona, and has never conducted a business out of
14 Arizona or had any employees in Arizona. [*Id.*, ¶ 14] She has never entered into a contract in
15 Arizona, nor has she entered into a contract that was to be performed in Arizona. [*Id.*, ¶ 15] Other
16 than the present matter, Mrs. Kelly has never been named as a party to a lawsuit, administrative
17 proceeding or criminal proceeding in Arizona. [*Id.*, ¶ 16] She does not maintain an agent for
18 service of process in Arizona and was not served with process in this action in Arizona. [*Id.*, ¶ 17]
19 And to the best of her recollection, Mrs. Kelly has never visited Arizona, either for business or
20 pleasure. [*Id.*, ¶ 10]

21 In short, the Division cannot point to a single contact, let alone "minimum contacts,"
22 between Mrs. Kelly and the State of Arizona. As such, no basis exists for the Commission to
23 exercise personal jurisdiction over her in this matter. Indeed, to do so would violate Mrs. Kelly's
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individual Due Process rights under the Fourteenth Amendment. Accordingly, the Commission must dismiss Mrs. Kelly from this matter for lack of personal jurisdiction.

B. A.R.S. § 44-2031(C) Is Unconstitutional Because Attempts To Impermissibly Enlarge The Commission's Authority Beyond That Granted In The Arizona Constitution.

The Commission derives its regulatory authority from the Arizona Constitution. *See* Ariz. Const. Art. 15, § 4; *see also State v. Goodrich*, 151 Ariz. 118, 121, 726 P.2d 215, 218 (Ct. App. 1986). It is well established that the Commission has no implied powers, and its powers do not exceed those to be derived from a strict construction of the Constitution and its implementing statutes. *See Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Comm'n*, 177 Ariz. 49, 55, 864 P.2d 1081, 1087 (Ct. App. 1993); *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946). The Commission's specific constitutional power over the sale of securities is limited to the inspection and investigation of corporations whose stock is offered for sale. *See Goodrich*, 151 Ariz. at 121, 726 P.2d at 218.

The Arizona legislature may enlarge or extend the Commission's power and duties "over the subject matter of which it has already been given jurisdiction." *Commercial Life*, 64 Ariz. at 139, 166 P.2d at 950 (emphasis added). However, where there is no express constitutional grant of power to regulate a subject matter, the legislature cannot unilaterally grant authority under the auspices of "securities regulation." *See, e.g., American Bus Lines v. Arizona Corp. Comm'n*, 129 Ariz. 595, 599, 633 P.2d 404, 408 (1981) (holding that absent a constitutional grant of power over motor carriers, legislature cannot grant to the corporation commission additional control over these carriers as an exercise of police power or otherwise.); *see also Rural/Metro Corp. v. Arizona Corp. Comm'n*, 129 Ariz. 116, 118, 629 P.2d 83, 85 (1981) (holding that the provision allowing the legislature to enlarge the powers of the corporation commission does not allow the legislature to

1 add entities to the "public service corporation" list, when they are not listed in Const. Art. 15, §2).
2 Indeed, legislative enactments that exceed the authority granted by the Arizona Constitution are
3 unconstitutional. *See Maricopa County v. Kinkos*, 203 Ariz. 496, 502, 56 P.3d 70, 76 (Ct. App.
4 2003).

5 Ostensibly, the Commission has the authority to regulate the offer and sale of securities.
6 *See Goodrich*, 151 Ariz. at 121, 726 P.2d at 218; *Commercial Life Ins.*, 64 Ariz. At 139, 166 P.2d
7 at 950. This necessarily includes regulating the companies and individuals that transact in
8 securities. *See id.* In essence, this is the "subject matter" of the Commission's constitutional
9 grant.
10

11 A.R.S. § 44-2031(C), however, improperly enlarges the Commission's powers beyond this
12 constitutional grant. A.R.S. § 44-2031(C) purports to allow the Commission to join a spouse in a
13 proceeding, solely to determine the liability of the marital community. This goes well beyond the
14 mere regulation of the offer and sale of securities. It allows the Commission to bring before it
15 individuals who are not involved in the transactions at issue and/or who are not affiliated in any
16 way with the corporation under investigation. It also subjects these spouses to potential penalties
17 (through the marital community). The statute is overreaching, its implementation exceeds the
18 Commission's express authority under Article 15, § 4, and it is unconstitutional.
19

20 **IV. MRS. KELLY SHOULD BE DISMISSED FROM THIS ACTION BECAUSE THE**
21 **DIVISION FAILED TO SERVE THE C&D ON HER.**

22 The Rules of Procedure for Investigations, Examinations, and Administrative Proceedings
23 set forth the service requirements for a C&D issued by the Division. R14-4-307 applies to
24 "Temporary Orders" and provides that "[t]emporary cease-and-desist orders shall be served
25 pursuant to the provisions of R14-4-303." R14-4-303, in turn, contains various provisions for
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1 service upon individuals, service upon corporations or other entities, and service in a foreign
2 country.

3 With regard to service in a foreign country, R14-4-303(F) provides:

4 F. Service in a foreign country. When serving a subpoena, notice or
5 temporary cease-and-desist order in a foreign country, service shall be
6 by any internationally agreed means. If service is not accomplished
7 within 120 calendar days from the date service was undertaken under
8 the internationally agreed means or if no internationally agreed means
9 of service has been established or the international agreement does not
10 prohibit the use of other means of service, then service of any
11 document may be made by any of the following:

- 12 1. In the manner prescribed by the law of the foreign country for
13 service in that country in an action in any of its courts of general
14 jurisdiction.
- 15 2. As directed by the foreign authority in response to a letter of
16 request.
- 17 3. By any of the following if not prohibited by the law of the foreign
18 country:
 - 19 a. Any method of service authorized by subsections (D) or (E).
 - 20 b. Diplomatic or consular officers when authorized by the United
21 States Department of State.
 - 22 c. By any other lawful method that is reasonably calculated to
23 give notice as directed by the Commission.

24 R14-4-303(F).

25 Mrs. Kelly is a full-time resident of Cancun, Mexico. [Kelly Declaration, ¶13.] She has not
26 lived in the United States since 1999. [Id.] Nevertheless, the Division failed to take the steps
27 necessary to even attempt to serve Mrs. Kelly, under internationally agreed means, as required by
R14-4-303(F)³. Instead, the Division attempted to accomplish service under R14-4-303, which
provides:

³Because Mexico is a signatory to the Hague Convention (as of June 1, 2000), service must be accomplished as provided for under that treaty. See *NSM Music, Inc. v. Villa Alvarez*, No. 02 C 6842, 2003 WL 685338, at *1 (N.D. Ill. Feb. 25, 2003). The Hague Convention does not permit personal service via a privately-retained process server. *Id.* "Rather, the Hague Convention contemplates personal service via the authorities of the country of destination [i.e., Mexico], or through the originating country's [i.e., the United States'] consular officials in the country of destination." *Id.*

- D. Service upon individuals. Service upon an individual may be made by any of the following:
 1. By personal service.
 2. By leaving a copy at the individual's dwelling, or usual place of abode, with an individual of suitable age and discretion residing therein.
 3. By leaving a copy at the individual's usual place of business or employment with an employee, express or implied agent, supervisor, owner, officer, partner, or other similar individual of suitable age and discretion.
 4. By leaving a copy with an agent authorized by express or implied appointment or by law to receive service of process for the individual upon whom service is being made.
 5. By mailing a copy to the last known dwelling, usual place of abode, business address, or mailing address. Subpoenas, notices, and temporary cease-and-desist orders served by mail shall be sent, return receipt requested, by certified mail, express mail, registered mail, or commercial courier or delivery service. The signed return receipt shall constitute proof of service, but shall not be the exclusive method of proving service.

A.A.C. R14-4-303(D).

Even assuming, arguendo, that the Division could serve Mrs. Kelly by complying with R14-4-303(D) without first attempting to accomplish service by internationally agreed means (which it cannot), the Division has failed to service the C&D on Mrs. Kelly. The Division attempted to accomplish service of the C&D on Mrs. Kelly under R14-4-303(D)(3), by leaving it with an employee of RHI, Inc., at RHI, Inc.'s office in South Bend, Indiana. But, RHI Inc.'s office is not Mrs. Kelly's "usual place of business or employment." Mrs. Kelly is not, and never has been, an officer, director, shareholder or employee of RHI, Inc. [Kelly Declaration, ¶ 9.] Consequently, the Division has failed to serve the C&D on Mrs. Kelly. Thus, Mrs. Kelly should be dismissed from this proceeding.

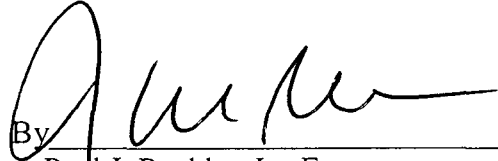
ROSHKA HEYMAN & DEWULF, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 V. CONCLUSION.

2 The Division has failed to meet its burden of establishing personal jurisdiction over
3 Mrs. Kelly under either the "general jurisdiction" or "specific jurisdiction" standards. The
4 Division also has failed to properly serve the C&D on Mrs. Kelly as required by the
5 Administrative Rules. Consequently, the Commission must dismiss the C&D, as against
6 Mrs. Kelly.

7 RESPECTFULLY SUBMITTED this 23rd day of June, 2003.

8 ROSHKA HEYMAN & DeWULF, PLC

9
10
11 By 

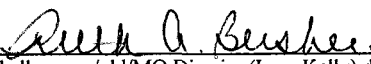
12 Paul J. Roshka, Jr., Esq.
13 Dax R. Watson, Esq.
14 One Arizona Center
15 400 East Van Buren Street, Suite 800
16 Phoenix, Arizona 85004
17 602-256-6100
18 602-256-6800 (facsimile)
19 Attorneys for Respondent Lory Kelly

20 ORIGINAL and thirteen copies of the foregoing
21 hand-delivered this 23rd day of June, 2003 to:

22 Docket Control
23 Arizona Corporation Commission
24 1200 West Washington Street
25 Phoenix, Arizona 85007

26 COPY of the foregoing hand-delivered
27 this 23rd day of June, 2003 to:

Marc E. Stern
Hearing Officer
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

1 Jaime Palfai, Esq.
2 W. Mark Sendrow, Esq.
3 Securities Division
4 Arizona Corporation Commission
5 1300 West Washington Street, 3rd Floor
6 Phoenix, Arizona 85007
7
8 COPY of the foregoing mailed
9 this 23rd day of June, 2003 to:
10
11 Joel Held, Esq.
12 Elizabeth Yingling, Esq.
13 Baker & McKenzie
14 2300 Trammell Crow Center
15 2001 Ross Avenue, Suite 2300
16 Dallas, Texas 75201
17 Attorneys for Respondents
18 Yucatan Resorts, Inc., Yucatan Resorts, S.A.,
19 RHI, Inc., and RHI, S.A.
20
21 Martin R. Galbut, Esq.
22 Jeffrey D. Gardner, Esq.
23 Galbut & Hunter, P.C.
24 2425 East Camelback Road, Suite 1020
25 Phoenix, Arizona 85016
26 Attorneys for Respondents
27 Yucatan Resorts, Inc., Yucatan Resorts, S.A.,
RHI, Inc., and RHI, S.A.

kellym.acc/pld/MO Dismiss (Lory Kelly).doc

DECLARATION OF LORY KELLY

I, Lory Kelly, declare:

1. I am named as a Respondent in this action. I have personal knowledge of the matters stated herein and am competent to testify to the following.

2. I am married to Michael E. Kelly, another named Respondent in this action.

3. I am a full-time resident of Cancun, Q.Roo, Mexico, and Cancun is my place of domicile. I have been a full-time resident of Cancun, Q.Roo, Mexico, since approximately March of 1999.

4. I do not own or maintain a residence in the United States.

5. I do not have an authorized agent for service of process in the United States.

6. Prior to moving to Cancun, Mexico, I was a resident of North Liberty, Indiana, and was employed by HealthSouth Physical Therapy & Rehabilitation ("HealthSouth"), located in South Bend, Indiana. I was a member of HealthSouth's office and clerical staff.

7. Since moving to Cancun, Mexico in or around 1999, I have not been employed.

8. I have never worked in the hotel, timeshare or leasing business.

9. I am not, and never have been, an officer, director, shareholder or employee of any of the following businesses or entities: Yucatan Resorts, Inc.; Yucatan Resorts, S.A.; Resort Holdings International, Inc.; Resort Holdings International, S.A.; or World Phantasy Tours, Inc., aka Majesty Travel, aka Viajes Majesty.

10. I have never lived in the State of Arizona. In fact, I do not recall ever having visited the State of Arizona for any reason, either business or pleasure.

11. I have never owned or leased property in Arizona.

12. I have never had a bank account in Arizona, and I have never drawn checks on an Arizona bank. I have never had any personal brokerage accounts managed by firms or branches of firms situated in Arizona.

13. I have never held any Arizona professional licenses and have never had an Arizona driver's license. I have never filed an Arizona State income tax return, and I am not registered to vote in Arizona.

14. I have never had an office in Arizona. I have never had a telephone listing or kept files in Arizona. I have never conducted a business out of Arizona nor have I ever had any employees in Arizona.

15. I have never entered into a contract in Arizona, nor have I ever entered into a contract that was to be performed in Arizona.

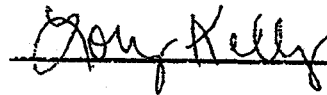
16. Other than the present matter, I have never been named as a party to a lawsuit, administrative proceeding or criminal proceeding in Arizona.

17. I do not maintain an agent for service of process in Arizona. I was not served with process in this action in Arizona.

18. I was not served with process in this action in Cancun, Mexico.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of June, 2003.

A handwritten signature in cursive script, appearing to read "Lory Kelly", is written over a solid horizontal line.

LORY KELLY